IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

AMDOCS (ISRAEL) LIMITED, an Israeli Corporation, Plaintiff, v. OPENET TELECOM, INC., a Delaware Corporation, and OPENET TELECOM LTD., an Irish Corporation, Defendants.	Case No. 1:10cv910 (LMB/TRJ)

OPPOSITION OF AMDOCS (ISRAEL) LIMITED TO MOTION TO COMPEL

Defendants have filed an unnecessary discovery motion that should be denied with a warning not to further distract the Court's and the parties' resources with wasteful motions practice. *See* Local Rule of the Eastern District of Virginia 37(G). There is nothing for this Court to compel. Plaintiff Amdocs (Israel) Limited ("Amdocs") did not "unilaterally cancel" the deposition of inventor Tal Givoly, and it is producing Mr. Givoly – who must travel from Israel – for deposition on the earliest date possible after January 27 (and two full months before discovery closes). The motion against Amdocs for "assistance" in scheduling the depositions of co-inventors Eran Wagner and Limor Schweitzer is equally unwarranted. Mr. Wagner and Mr. Schweitzer are non-parties on whom no subpoena has ever been served. In any event, defendants have since agreed to depose Mr. Wagner on March 2 in Palo Alto and Amdocs' counsel is working diligently to procure the availability of Mr. Schweitzer, who resides in Portugal. In short, contrary to this Court's rules, defendants have filed this motion to compel for no legitimate purpose. It should be denied.

A. Amdocs Has Already Agreed to Produce Tal Givoly for a Deposition "Forthwith"[1]

Openet seeks an "order compelling [Amdocs] to produce forthwith for deposition Tal Givoly." Dkt. No. 36 (hereinafter, "Mot.") at 1. Amdocs is already producing Mr. Givoly for a deposition on February 16, 2011, which is the next date he is available given that he must travel from Israel. Amdocs confirmed that date with Openet at 2 p.m. on January 21, 2011. Ex. 1 [Email from Mr. Lantier to Mr. Pandya]. Openet's motion to compel three hours later was therefore unnecessary to obtain a deposition of Mr. Givoly at the earliest possible date.

Openet also requests that Mr. Givoly be required to appear in Washington, D.C. instead of New York City. Mot. at 3. Prior to filing its motion, Openet never objected to Mr. Givoly's deposition taking place in New York City.[2] Indeed, until now, both parties have accommodated corporate witness requests for the locations of their depositions, despite Local Rule 30(A)'s requirement that party witnesses ordinarily must appear in the Eastern District of Virginia.[3] *See, e.g.* Ex. 2 [Jan. 19 Email from Mr. Pandya]. If the Court is inclined to require, pursuant to Local Rule 30(A), that Mr. Givoly appear in Washington, D.C., rather than in New York City,[4]

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[1] Section I of defendant's brief, titled "Plaintiff Amdocs Has Failed to Expedite this Case," contains no argument relevant to the relief defendants seek and appears to be included in defendants' brief solely as an attempt to cast unfounded aspersions on Amdocs. To the extent any party has "failed to expedite" the discovery process, it is the defendants, who intentionally withheld searchable versions of their files for over two weeks and who have yet to serve substantive responses to Amdocs' interrogatories served on December 2, 2010.

[2] Amdocs has proposed New York City as the location for Mr. Givoly's deposition because he was able to reserve direct flights between Tel Aviv, Israel and the New York City area, but not the Washington, D.C.-area airports.

[3] Rule 30(A) provides: "Any party, or representative of a party (e.g., officer, director, or managing agent), filing a civil action in the proper division of this Court must ordinarily be required, upon request, to submit to a deposition at a place designated within the division. . . . A defendant, who becomes a counterclaimant, cross-claimant, or third-party plaintiff, shall be considered as having filed an action in this Court for the purpose of this Local Rule."

[4] Washington, D.C., is, of course, not within this division. However, Local Rule 30 would appear to be the basis for defendants' request (as defendants have not identified any other basis).

Amdocs does not oppose, so long as that rule is applicable to all party witnesses, including the five company witnesses counterclaimant Openet Telecom, Inc. has offered for deposition only in Dublin, Ireland, and the company witness it has offered only in California. *See* Ex. 2.

Finally, defendants' motion fails to explain the reason why it was necessary to reschedule Mr. Givoly's deposition from January 27 to February 16. Contrary to defendants' representations, postponing Mr. Givoly's deposition was not a "unilateral" act by Amdocs, but was instead a measured response to defendants' unilateral and unreasonable discovery demand that Mr. Givoly's e-mails be produced in under 24 hours and only three days after the parties reached agreement on the terms and protocol of their email search, review, and production. Amdocs had sought for weeks to come to agreement on the terms and protocol for email production, with no response from defendants. *See* Ex. 3 [Lippert Jan. 6, 2011 email to Son]; Ex. 4 [Walden Jan. 14, 2011 email to Pandya]. On January 18, 2011, the parties finally met and conferred and agreed upon the terms for the search, as well as the protocol for the search and production (*i.e.*, the parties should search emails, not attachments, but would produce both emails and their attachments). Searching emails is only the first step towards their production, documents must afterwards be screened for privilege, converted to .tif format, bates-stamped, copied onto a producible medium, etc. Yet only ***two days*** after the parties reached an agreement on emails, counsel for defendants sent a letter to counsel for Amdocs unilaterally demanding that all of Mr. Givoly's emails be produced ***by the following day***. *See* Ex. 5 [Jan. 20 Letter from Mr. Pandya to Mr. Lantier]. Openet stated that, if the email production was not completed by January 21, it would hold Mr. Givoly's deposition open.[5] *Id.*

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[5] As of the time Openet filed its motion, neither party had yet produced any emails. Both parties are producing emails this week.

Amdocs could not meet Openet's belated and unreasonable request for Mr. Givoly's email production to be complete by the following day (*i.e.*, three days after the parties agreed to begin reviewing and producing emails). At the same time, Amdocs also did not want to deprive Openet of the amount of time it said it needed to review Mr. Givoly's emails prior to his deposition, nor did it want to create a circumstance in which Mr. Givoly might be required to travel to the United States twice for a deposition. Therefore, Amdocs reached out to Mr. Givoly to obtain his next available date for deposition in the United States, which was February 16. On January 21, Amdocs identified this date for Openet. Ex. 1. Rather than accept it (or agree to complete the deposition as scheduled on January 27), Openet reiterated that it would attempt to require Mr. Givoly to make multiple trips to the United States from Israel for his deposition. Ex. 6 [Jan. 21 Email from Mr. Pandya to Mr. Lantier]. As this was not reasonable or necessary given that nearly three months remained in the discovery period, Amdocs confirmed that Mr. Givoly's deposition would proceed on February 16 in New York City.

Thus, Amdocs has not refused to provide timely discovery and is indeed producing Mr. Givoly for his deposition "forthwith." Nor are defendants prejudiced by the rescheduling of Mr. Givoly's deposition to February 16 in New York City. Following that deposition, defendants will still have almost a month before their initial expert report is due, and a full two months before fact discovery closes. There is no basis for Amdocs' motion to compel and it should be denied.

B. Defendants' Motion to Preclude Evidence Based on Whether Non-Parties Wagner and Schweitzer Testify Should Be Denied

Defendants' motion against ***Amdocs*** requesting "assistance" in scheduling the depositions of inventors Eran Wagner and Limor Schweitzer, and moving *in limine* for the exclusion of evidence at trial, is as unfounded as its motion to "compel" Amdocs to produce Mr.

Givoly's deposition. ***First***, defendants have ***never served a subpoena*** on either inventor, and they therefore have no basis to demand an order that those inventors appear for deposition prior to February 25, 2011 or that the Court exclude evidence of conception and reduction. Defendants' motion effectively asks for a severe discovery sanction (the preclusion of evidence at trial) on the basis of discovery requests that have not only not been violated – they don't even exist. It is unsurprising that defendants cite no authority in their brief; their outlandish request finds no support in this or any other court's precedents.

Second, Messrs. Wagner and Schweitzer are ***third parties*** whom Amdocs cannot force to appear for a deposition. Nevertheless, Mr. Wagner has agreed to make himself available March 2 in Palo Alto, and defendants have accepted that date. Ex. 7 [Jan. 26 Email from Mr. Pandya]. Mr. Schweitzer is located in Portugal and has not yet identified a date on which he is available. While WilmerHale is representing each inventor for purposes of accepting Openet's subpoenas to them (not that Openet has served any), (*see* Ex. 4), plaintiff Amdocs has no ability to require either to appear for a deposition by any date. Penalizing Amdocs for Mr. Schweitzer's or Mr. Wagner's unavailability for deposition would be unfair and unprecedented.

Third, equally unfair and unprecedented would be the entry of an order prospectively prohibiting Amdocs from submitting evidence of conception and reduction to practice of the inventions if Mr. Wagner or Mr. Schweitzer do not appear for a deposition. In that case, Mr. Givoly's testimony would not necessarily be "uncorroborated" as Openet seeks to have this Court prematurely find. Mot. at 3-4. Rather, as is true in many cases, Mr. Givoly's testimony could be corroborated by documentary evidence or other means. *See, e.g., Sandt Tech., Ltd. v. Resco Metal & Plastics Corp.*, 264 F.3d 1344, 1350-51 (Fed.Cir.2001) ("Documentary or physical evidence that is made contemporaneously with the inventive process provides the most reliable proof that the inventor's testimony has been corroborated ”). Further, while the absence of the other inventors’ testimony may be used to attempt to impeach Mr. Givoly’s testimony, Amdocs is aware of no precedent (and Openet has identified none) supporting the proposition that the other inventors’ absence could properly form the basis for excluding Mr. Givoly’s testimony. There is certainly no general rule of evidence that requires all witnesses to an event to testify in order for any testimony regarding that event to be admissible.

Fourth, Amdocs has already informed defendants that Mr. Wagner will make himself available for a deposition on March 2, and is doing everything within its power to obtain the availability of Mr. Schweitzer. Openet has no basis (and has identified none) to complain about the efforts Amdocs and its counsel have made to make these witnesses available.

Fifth, Openet has not shown and cannot show that it has been prejudiced at this point in time. Instead, it effectively asks the Court to assume that it will be prejudiced, and to make a sweeping and erroneous evidentiary ruling prospectively on that basis. The Court should not do so.

For the foregoing reasons, Amdocs respectfully requests that defendants’ motion to compel be denied, and that the Court issue a warning pursuant to Local Rule 37(G) to defendants not to file additional unnecessary discovery motions.

January 26, 2011

Respectfully submitted,

_/s/____________________
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2011, I served the foregoing on the following counsel for Openet Telecom, Inc. and Openet Telecom Ltd. via the court's ECF system, which caused electronic notification to be sent to the following:

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